JD–01–06
Fredericksburg, VA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MOTION CONTROL INDUSTRIES, INC.

and Case 5–CA–31960

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, LOCAL 2123, AFL-CIO

James C. Panousos, Esq., for the General Counsel.
John M. Barr, Esq. and *Joseph D. McCluskey, Esq.,* of Richmond, Virginia, for the Respondent.

DECISION

Statement of the Case

C. RICHARD MISERENDINO, Deputy Chief Administrative Law Judge. This case was tried in Washington, DC, on October 27-28, 2004. The charge was filed on June 4, 2004,[1] and the complaint was issued on August 27, 2004.

In early 2004, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Local 2123, AFL-CIO (Union) sought to organize certain employees working at the Fredericksburg, Virginia facility of Motion Control Industries, Inc. (Respondent or Company). The complaint alleges that during the course of the Union's organizing effort, the Respondent, through its managers and supervisors, violated Section 8(a)(1) of the Act by engaging in the following conduct: informing employees that choosing a union was futile; promulgating an overly-broad no solicitation rule; telling employees to stop engaging in union and/or protected concerted activities; confiscating Union literature; soliciting grievances in order to discourage employees' support for the Union; threatening employees with loss of benefits and plant closure if the Union were selected; and issuing a letter to all employees threatening that their benefits would start over from scratch if the Union was selected and soliciting their grievances in order to discourage support for the Union. The complaint further alleges that the Respondent violated Section 8(a)(3) of the Act by isolating the principal union advocate, Steven Medley, from contact with other employees, subjecting him to closer supervision, and ultimately discharging him because of his union activity.

On the entire record, including my credibility determinations based on the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

[1] All dates are in 2004 unless otherwise indicated.

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, is engaged in the manufacture and non-retail sale and distribution of brake pads and related products with an office and place of business in Fredericksburg, Virginia. During the 12-month period preceding August 27, 2004, it sold and shipped from its Fredericksburg facility, goods valued in excess of $50,000 directly to points outside the State of Virginia. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. *The Respondent's Business*

The Respondent's facility manufactures heavy-duty brake linings used in 18 wheel tractor-trailer trucks. (Tr. 17, 18, 21.) It operates 3 shifts a day, 7 a.m. – 3 p.m., 3 p.m. – 11 p.m., and 11 p.m. - 7 a.m. (Tr. 97, 231, 282.)

Several different formulas are used to produce break linings. (Tr. 20, 25.) The production manager determines the formula(s) that will be used on any given day. (Tr. 25.) Once the formula is determined, the shift supervisor prints a blend sheet from a computer and gives it to the mixer operator. A blend sheet, which is similar to a recipe card, shows the ingredients to mixed, the number of containers of each ingredient, and the appropriate number of pounds of each ingredient to be blended. (Tr. 23; see e.g., GC Exh. 3(A).)

The mixer operator coordinates with a forklift driver to bring the ingredients listed on the blend sheet to the mixing area. (Tr. 23.) Once the materials are delivered to the mixing area, the mixer operator loads the "batch" of ingredients onto a conveyer belt in the order that they appear on the blend sheet. (Tr. 26) When the ingredients are ready to be run through the mixer, the mixer operator will radio for a quality control inspector (QCI) to check the batch. (Tr. 28-29.)

The QCI is responsible for verifying that the correct ingredients and the correct amounts of those ingredients listed on the blend sheet are on the conveyor belt. (Tr. 52, 53.) If everything is correct, the QCI checks off all the ingredients and initials the blend sheet. The mixer operator cannot begin the mixing process until the QCI has signed the blend sheet. (Tr. 53.)

Earlene Ross was the Quality Assurance Manager at the Respondent's facility. She had overall responsibility for ensuring the quality of the Respondent's product. She supervised three quality control inspectors (one on each shift), one final release inspector, and one lab technician. (Tr. 17.) Ross worked for the Respondent from September 2002 – June 2004.

Steven Medley was a third shift QCI reporting to Ross. (Tr. 39.) In May 2003, he began working for the Respondent as a press operator. A few months later, he was promoted to second shift QCI. (Tr. 96.) In November 2003, Medley voluntarily became the third shift QCI. The Respondent discharged Medley on April 7, 2004.

B. *The Organizing Campaign*

1. Medley contacts the Union

In February 2004, Steve Medley contacted Union Chairman, Chuck Sulser, about organizing the Respondent's employees. (Tr.130.) Shortly thereafter, Medley became the Union's primary contact person at the Fredericksburg facility. (Tr.134.) He distributed union materials, including the authorization cards, drafted several Union flyers, and spoke with employees about the benefits of joining a union. He also elicited signed authorization cards during breaks and before and after work. (Tr.135.)

2. The Company learns about the Union

In mid-February 2004, an employee told Plant Manager Fred Allen that some employees were interested in obtaining union representation at the facility. (Tr.414.) Allen testified that the employee came into his office and gave him a piece of paper with directions to a union meeting. (Tr. 414-415.)

Shortly thereafter, the Respondent held two manager meetings to discuss the various aspects of a union organizing campaign and strategies for dealing with one. (Tr. 404-405.) On February 20, the Company's managers met to discuss supervisor "Do's and Don'ts." (Tr. 405.) All supervisors, including Allen, were cautioned that threatening, interrogating, promising, and surveilling employees because they support or are perceived to support a union may be unlawful. The discussion was accompanied by a slide show presentation. (R. Exh. 3.) Two weeks later, another meeting was held where many of the same topics were reviewed in greater detail and a written supervisor's guide was distributed. (Tr. 407- 408; R. Exh. 27(a).)

3. Medley initiates a conversation with Ross about the Union

a. *Facts*

Two weeks after Medley contacted with the Union, he went to Ross, his supervisor, to talk about work issues and the Union.[2] (Tr.131.) Medley testified that he approached Ross to discuss unionization because he considered her a friend and he valued her opinion. (Tr.132.) In addition, Medley stated that he initiated these conversations because he believed that the Respondent's opposition to a union was not necessarily the position of its supervisors and employees. (Tr. 193; GC Exh. 2 at 9.)

Medley told Ross that he believed a union could make positive changes at the facility. (Tr.132.) Ross told him that she previously worked in a unionized workplace and that a union could not correct the problems at Motion Control. Medley replied that a union had succeeded in making positive changes at his mother's workplace. Ross reiterated that based on her experience with the AFL-CIO, a union could not fix the problems at Motion Control. (Tr. 328.) The conversation lasted about 20-30 minutes with only Ross and Medley present.

[2] Around the same time, Medley sought out third shift supervisor, Bryan Williamson, and second shift supervisor, Benny Short, to elicit their views on unionization. He testified that he spoke only with Ross, Williamson, and Short because he trusted them. (Tr. 194.)

b. *Analysis and findings*

Paragraph 5(a) of the complaint alleges that when Ross told Medley during this meeting that there was nothing the Union could do to fix problems at the Respondent, she unlawfully implied that it was futile to select a Union.

Section 8(c) gives an employer representative the right to express an opinion about a union so long as the expression does not contain a threat of reprisal or force or promise of benefit. The undisputed evidence shows that Medley engaged Ross in a one-to-one conversation in her office to elicit her personal views on the Union because he considered her a friend and he valued her opinion. He also presumed that Ross did not necessarily agree with the Company's position opposing a union. The undisputed evidence also shows that Ross explained that her views were based on her personal experiences as a former union member and that they were not accompanied by any threat or promise. Finally, the evidence shows that during their conversation Medley disagreed with Ross' view and debated the issue with her. I find that this was exactly the type of exchange that 8(c) was designed to allow and protect. Accordingly, I recommend that the allegations of paragraph 5(a) of the complaint should be dismissed.

4. Orsulak's one-on-one employee meetings

a. *Facts*

In late February - early March 2004, Human Resources Manager John Orsulak was instructed by his boss, Division Human Resources Manager Norman Tarbell to conduct one-on-one meetings with employees to discuss problems at the Fredericksburg facility. (Tr. 79, 84-85, 319.) Although he had never previously conducted one-to-one employee meetings, Orsulak testified that he met with approximately 70-75 employees to find out "if they had any issues, suggestions that type of thing." (Tr. 76, 83, 321.) Orsulak denied asking employees whether they supported the Union or whether they signed an authorization card, but he conceded that some of the employees volunteered that information. (Tr. 80.)

Mixer Operator Sonja Turner testified that in her one-to-one with Orsulak, she was asked if there was anything bothering her, and if she had any complaints. (Tr. 262.) Turner stated that Orsulak told her that their conversation was confidential and that he was doing one-to-ones "to see what's wrong, why are the employees so upset and so angry." (Tr. 263.) She stated that when she asked him "why are you all going to wait until we try to form a union before you want to find what's wrong?" Orsulak responded that his boss told him to find out what was wrong.

Orsulak took contemporaneous notes of the issues and suggestions provided by the employees in the one-to-one meetings. (GC Ex. 34; Tr. 79, 262.) Relying on this information and additional comments made by the employees at two general meetings, Orsulak prepared a document for management on March 25, 2004, which outlined the issues, identified ways to resolve the issues, and established completion dates for resolving the issues raised by the employees.[3] (GC Exh. 21; Tr. 76-78.)

[3] The evidence shows that all of the issues identified by Orsulak for management were resolved in March 2004, well in advance of the April 23 union election date.

b. *Analysis and findings*

Paragraph 6 of the complaint alleges that the Respondent, through Orsulak, used these meetings for the purpose of soliciting grievances from the employees in order to discourage their support for the Union.

In *Wal-Mart Stores, Inc.,* 340 NLRB 637, 640 (2003), the Board stated:

> It is well established that an employer with a past practice of soliciting employee grievances through an open door or similar-type policy may continue such a policy during a union's organizational campaign. See, e.g., *Kingsboro Medical Group,* 270 NLRB 962, 963 (1984). It is also well-established that it is not the solicitation of grievances itself that violates the Act, but rather the employer's explicit or implicit promise to remedy the solicited grievances that impresses upon employees the notion that union representation is unnecessary.

See also, *TNT Logistics North America, Inc.,* 345 NLRB No. 21, slip op. at 3 (2005).

The Respondent asserts that it has a long standing policy of soliciting grievances, which is embodied in its employee handbook. It relies specifically on a statement in the handbook which encourages open communication and "an exchange of thoughts, ideas and concerns between employees and all levels of management." (GC Exh. 2, p. 3-4.) It also relies on a section entitled, "Communication" that reiterates the importance of open communication and delineates five methods in which the Respondent will disseminate information to the employees. (GC Exh. 2, pp. 3-4, 24-25.) One of those methods is the "Team Talks" held by the Respondent on a monthly basis in order to disseminate information to the employees. The handbook states that the Team Talks "is also a forum for employees to make suggestions, express perceived problems, and identification of safety issues." (GC Exh. 2, p. 24.)

Contrary to the Respondent's assertions, however, there is no evidence that the Team Talks were actually used as a forum to solicit and address employee grievances. More significantly, there is no evidence that the Respondent ever engaged employees in one-to-one meetings to solicit their grievances prior to February 2004. Indeed, the employee handbook does not reference one-to-one meetings. It is not listed as a "method" of open communication on page 24 of the handbook. To the contrary, Orsulak conceded that in the 2 ½ years prior to February 2004 that he was human resources manager, he did not hold any one-to-one meetings with employees. Rather, the one-to-one meetings did not start until after the Respondent learned of the Union's organizing effort. Thus, based on the evidence viewed as a whole, I find that the Respondent did not have an established practice of holding one-to-one meetings to solicit employee grievances.

In addition, the evidence shows that the purpose for initiating the one-to-one meetings was to solicit employee grievances in order to remedy them. Orsulak testified that his supervisor, Norman Tarbell, wanted him to hold one-to-one meetings "to see what issues were in the minds of employees, and if there was anything that could be done to correct any issues." (Tr. 85.) In the Team Talks, Plant Manager Allen specifically told the employees that he had heard there have been some issues bothering the employees, that Orsulak was currently holding employee meetings to listen to these issues, and that the employees should be honest with him during these meetings, because "if we don't know something is broken, we can't fix it." (R. Exh. 1; Tr. 85, 411.) I find that his remarks can be reasonably construed as a promise to remedy employee complaints.

Finally, the unrebutted evidence shows that the Respondent not only promised to remedy the employee's complaints, it did so. Orsulak took detailed notes of each one-to-one meeting (GC Exh. 34) and created a "to do" list of items affecting working conditions that needed to be remedied. Almost all of these problems were remedied by the Respondent prior to the union election. (GC Exh. 21; Tr. 322-323.) Notably, the evidence shows that many of these items could have been detected by simply walking around the plant, but were not acted upon until they were complained about during the one-to-one meetings.[4] Thus, the evidence viewed as a whole shows that the Respondent by its words and conduct solicited employees' grievances, promised to "fix" the problems, and did fix almost all of the workplace problems complained about at these meetings.

Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 6 of the complaint.

5. "Team talks" with Allen

In March 2004, Production Manager Fred Allen gave a "team talk" to production employee groups on each of the three shifts.[5] (Tr. 147, 150, 257-258, 260, 296-297, 409-410.) These meetings lasted between 20 – 40 minutes. (Tr. 148, 258.) Orsulak was present at each of the sessions. (Tr. 148.)

Allen started each "team talk" with a general discussion about production which led into a discussion about the Union. Employees Medley, Bundy and Turner testified that Allen told the employees that he heard about their unionizing efforts and that he urged them to weigh the pros and cons of having a union. (Tr. 259.) He also reminded the employees that they were currently receiving good wages, benefits, and retirement. Allen told the group that the Company did not need a union.

Recollections differ, however, regarding other aspects of Allen's speech and whether Allen read from and strictly followed a script he was holding. Third shift QCI Medley testified that Allen "talked a little bit about the plant, of course, like a normal team talk. And then [he] brought up that the company had gotten wind that we were trying to form a Union. He then proceeded to pull out a letter. ... I don't know who the letter was from, but he read the letter word-for-word...."[6] (Tr. 149, 200.)

According to Medley, the document from which Allen read

> "...talked about our company and how we didn't need to have a Union, how the Union couldn't do anything to help us. How the Union would force us to start over from scratch if we were to negotiate a new contract as far as our benefits and pay.

---

[4] Query, if the Respondent had a long standing policy of soliciting grievances, why was it necessary to hold one-to-one meetings and why were there so many problems that needed to be resolved?

[5] Monthly "team talks" were typically conducted by the plant manager. In September 2003, Allen began holding "team talks" whenever the plant manager was absent. (Tr. 410.) Allen also testified that he typically used a script for the "team talks." (Tr. 410.)

[6] There is no evidence that Allen read from a "letter." Rather, the credible evidence shows that Allen read from a prepared type-written script.

> It talked about how our pay would freeze, and basically just a letter saying, you know, don't do this, it's not a good thing. And then further, after he read the letter, we had a couple of people ask some questions, you know, basically, general questions.
>
> Well, you know, why can't we get machines fixed, why can't we do this, why can't we do that. Again, anything that referred possibly to the Union, Mr. Allen would refer back to the letter and read verbatim.
>
> Although someone mentioned plant closing and he did mention that we had another facility in the Motion Control family that had organized a Union and that the Union didn't stop them from being closed, and there was no guarantee that they would stop our plant from being closed."

(Tr. 149-150, 201.)

Medley also testified that with respect to the question and answer session, Allen read from the document stating, "I'm going to read, and he would read specifically from the document. Other questions, he would lay it down and then proceed to answer the question." (Tr. 210.) Medley added that when Allen responded to a question about plant closure, the document was on the table.

First shift Mixer Operator Sonja Turner testified that when Allen spoke he "glanced down at something in his hand, it was folded...[h]e appeared to be glancing at something, but then looking up at us, talking." (Tr. 260.) He told the employees that "[h]e heard that some of us wanted a union and that we should listen, before we get into something that we really don't know about." (Tr. 259.) She elaborated that:

> He had pros and cons. Don't give up what you already have for something that you may not get. Motion Controls pays competitive wages, some of the best in the area. We have good benefits. We have good retirement. You know, don't throw it all away. You know, unions are known for shutting big organizations down, they don't last long once unions come in, companies hang around for like six months and then they're gone, their doors are closed because of unions.
>
> So he said he strongly urged us to listen to both sides of the, you know, listen to the company's side, listen to the union's side. He said I can't tell you what to do, you make your own decision, but you should know what you're getting yourself into.[7]

(Tr. 259.)

[7] Turner was an active and open Union supporter, who took detailed notes of union meetings. (Tr. 270, 272.) She testified that she also kept notes of "events that occurred at the plant." (Tr. 273.) In cross-examination, however, she conceded that her notes do not mention that Fred Allen told the employees that the plant would close if the Union were selected. (Tr. 275-277.) She unconvincingly asserted that "it's in there," but was unable to point to anything specific in her notes to support such an inference.

Quality Control Inspector Kenneth Bundy attended a second shift team talk. (Tr. 297.) Bundy testified that he had a front view of Allen during the speech which started off with production and eventually turned to the Union. (Tr. 298.) Bundy testified that Allen told the employees several times that "we didn't need a third party" and that "if push came to shove, which he didn't see right then and there, but, down the road, that the plant could close." (Tr. 299.)

Fred Allen stated that he used a script for the March 2004 "team talks." (Tr. 411; R. Exh. 1.) He stated that he discussed all the points on the script and did not discuss any points that were not on the script. (Tr. 412-413.) Allen denied telling the employees that the Fredericksburg facility would be shut down if the union was selected. He denied telling the employees that they would lose any of their benefits if the union was selected. (Tr. 413.) He also denied telling the employees that all bargaining would start from scratch. (Tr. 413-414.)

I credit Allen's denials for the following reasons. First, Allen's testimony that he followed the script is corroborated by the General Counsel's key witness, Steven Medley, who testified that Allen " proceeded to pull out a letter. ... I don't know who the letter was from, but he read the letter word-for-word...." (Tr. 149, 200.) General Counsel witness Turner also testified that Allen appeared to be glancing down at something, then looking up at the employees. (Tr. 260.)

Second, the script does not state that bargaining would start from scratch or that the employees would lose benefits or that the plant would close. (R. Exh. 1, GC Exh. 22.) Rather, it corroborates Allen's testimony. With respect to benefits, the script states:

> 6 THE COMPANY IS NOT REQUIRED TO CONTINUE ITS PRESENT BENEFITS IF A UNION GET IN. WHATEVER BENEFITS THE EES RECEIVE AFTER THE UNION GETS IN WILL HAVE TO BE NEGOTIATED WITH UNION THE BENEFITS EES RECEIVE AFTER THE UNION GETS IN COULD BE LESS THAN THEY RECEIVE NOW OR THEY COULD BE MORE. NO LAW REQUIRES THE COMPANY TO CONTINUE ITS PRESENT BENEFITS IN ANY CONTRACT NEGOTIATED WITH THE UNION.

With respect to the plant closing, it states:

> 11 UNIONS WILL PROMISE THE EES ANYTHING IN ORDER TO PERSUADE THEM TO VOTE FOR THE UNION HOWEVER TI THE EMPLOYER WHO CAN DELIVER THE GOODS. THE ONLY WAY A UNION CAN FORCE AN EMPLOYER TO DO SOMETHING IS TO PULL THE EES OUT ON STRIKE – AND THAT OFTEN LEADS TO REDUCED PRODUCTION AND CONSEQUENTLY LAYOFFS AND EVEN PLANT CLOSINGS.

(R. Exh. 1.)

Third, none of the General Counsel's witnesses corroborated Medley's assertions that Allen told his group that bargaining would start from scratch or the employees would lose benefits or that the plant would close. At best, Bundy who attended the second shift "team talk," testified that Allen told the employees that "if push came to shove, which he didn't see right then and there, but, down the road, that the plant could close." (emphasis added.) (Tr. 299.) His paraphrasing of what he heard Allen tell the employees falls far short of a statement that "the plant would close" and that it would close simply because a union was selected. Indeed,

Bundy's testimony more closely reflects what appears in the actual script, which Medley concedes was read "verbatim" by Allen. (Tr. 149.)

Finally, the evidence shows that less than two weeks before this "team talk" Allen and all of the other managers/supervisors attended two training sessions on how to respond to the Union organizing effort. A careful review of the supervisor training materials reflects that the supervisors were admonished that they should not tell employees that if they vote for the union income and benefits would be reduced or that the company would close or move. (R. Exh. 3; R. Exh. 27 A-G.) Paragraphs 6 and 11 of Allen's speech cited above were lifted verbatim from these training materials. (See R. Exh. 27F, paras 14 and 44.) Thus, I find that it is more likely, than less, that Allen followed the instructions he received immediately preceding the "team talks."

For all of these reasons, I credit Allen's testimony denying that he told the employees during the team talks that benefits would be cut, the plant would close, or that bargaining would start from scratch if the Union was selected.

Based on Allen's credited testimony, I find that the statements made at the team talks did not violated Section 8(a)(1) of the Act as alleged in paragraph 7(a) and (b) of the complaint. Accordingly, I shall recommend the dismissal of these allegations of the complaint.

6. Medley identifies himself as a Union activist

On March 4, 2004, Medley called Orsulak to arrange a one-to-one meeting with him.[8] (Tr. 75, 140.) Orsulak asked Ross to attend the meeting because she was Medley's supervisor. When Medley arrived at Orsulak's office and saw Ross, he asked to have another hourly employee present, but Orsulak refused to pull an employee off the production line.[9] (Tr. 333.) When Medley pressed the issue, Orsulak told him that he could either go forward with the meeting that he requested without another employee or there would be no meeting.

Medley proceeded with the meeting taking out a letter that he had prepared to Orsulak. The letter, dated March 4, 2004, stated:

> As representative for the hourly employees of Carlisle Motion Control, Fredericksburg location, It is my duty to inform you that the employees of Motion Control have agreed by majority decision to be represented in this facility by the United Auto Workers Union. We are asking at this time that you recognize the United Auto Workers Union as our representative.

(GC Exh. 18C and 29.)

When Medley attempted to give the letter to Orsulak, he refused to accept it. Medley testified that he stood up, read the letter aloud, and placed it on Orsulak's desk. (Tr. 70-71, 145.)

[8] Up until that point, Medley did not want to meet with Orsulak one-to-one because he did not want to divulge any information about plant problems that the Respondent could quickly correct. (Tr. 140, 143.)

[9] Medley testified that he wanted another employee present because the meeting concerned Union activity and he wanted someone he trusted to witness the discussion. (Tr. 143.)

Orsulak tried to hand back the letter, but Medley refused to take it and left the office.[10] The meeting lasted 10-15 minutes. Orsulak instructed his secretary to mail the letter back to Medley, which she did. (GC Exh. 18A-C, 19.)

7. The March 11, 2004 letter to the employees

a. *Facts*

Shortly after March 11, 2004, the Respondent sent an unsigned letter to all employees at their personal residences.[11] (Tr. 82, GC Exh. 20.) The letter states in relevant part:

> It has come to our attention that there have been discussions regarding the need for a union to represent the employees at our Fredericksburg facility. Some of you were employed by Motion Control the last time these issues arose. Those of you who have been with Motion Control for a while know that we have a history of paying good wages providing competitive benefits, treating employee fairly and maintaining good working conditions. In all fairness, we think you need to be aware of a few facts as you consider the promises typically made by union supporters.
>
> First and foremost, we do not feel that you need a third party to discuss and resolve any issue you may feel is important. In fact, there are several ways you have to work with the management team at Motion Control to help in bettering your workplace. You can speak to your supervisor, leave a suggestion in the "Suggestion Box" in the vendateria, ask questions during the "Team Talks," participate on an employee committee, such as the Safety Committee, and express your concerns during the one-on-one meetings which are currently being conducted. You should also be aware that Motion control management maintains an "open door" policy to give you additional access. These options let you offer your opinions to management in a method that is comfortable for you. Why put yourself in a situation where someone else speaks for you? You have your own voice now!
>
> Motion Control currently provides a very competitive benefit package that includes health, dental and vision insurance coverage, prescription drug plan coverage, company matched 401k contributions, company paid life insurance for each and every employee, company paid pension plan, paid holidays, paid vacation and many others. All of those benefits were offered by the Company because we felt it was the proper thing to do for our employees. Those are benefits that are already yours. **Understand that all of these things will be renegotiated when you are represented by a union. All current benefits start over from scratch and, for them to**

[10] The unrebutted evidence shows that thereafter Medley wore a UAW button to work each day above his name tag. (Tr. 146 - 147.)

[11] Orsulak testified that in March 2004, Division Human Resources Manager Norm Tarbell emailed a copy of the letter to him. (Tr. 81.)

> **continue, Motion Control has to agree to continue them.** The union cannot demand that they be continued. The union may even bargain away your benefits during negotiations. Why risk losing the benefits you have worked for and those with which you are currently provided?

(emphasis added.)

b. *Analysis and findings*

Paragraph 8(a) of the complaint alleges that the Respondent unlawfully threatened the employees that bargaining would start from scratch if the Union was selected as the their collective-bargaining representative.

The standard for determining whether statements of this type violate Section 8(a)(1) of the Act was enunciated by the Board in *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980), enfd. 679 F.2d 900 (9th Cir. 1982):

> It is well established that "bargaining from ground zero" or "bargaining from scratch" statements by employer representatives violate Section 8(a)(1) "if, in context, they reasonably could be understood by employees as a threat of loss of existing benefits and leave employees with the impression that what they may ultimately receive depends upon what the union can induce the employer to restore. On the other hand, such statements are not violative of the Act when other communications make it clear that any reduction in wages or benefits will occur only as a result of the normal give and take of negotiations. [citations omitted.]

Applying this standard here, I find that the statement "[u]nderstand that all of these things will be renegotiated when you are represented by a union. All current benefits start over from scratch and, for them to continue, Motion Control has to agree to continue them," could be reasonably understood as a threat of loss of existing benefits. The language goes beyond the carefully articulated statements in Allen's team talks script leaving the reader with the impression that what they ultimately receive depends, not on the give and take of collective-bargaining, but upon what the union can induce the employer to restore. *The Earthgrain Company,* 336 NLRB 1119, 1120 (2001). Further, the impression here was made in writing to the employees at their homes, which unlike a statement spoken, would unlikely fade in time, but would be renewed with every re-reading of the letter by the employee. It is within this context that the statement violates Section 8(a)(1) of the Act as alleged in paragraph 8(a) of the complaint.

Paragraph 8(b) of the complaint asserts that in the same letter the Respondent unlawfully solicited grievances from the employees in order to discourage their support for the Union. As noted above, many of the methods for communicating employee concerns to the Respondent suggested in the letter were in existence long before the Union organizing campaign began. (GC Exh. 2, p. 24.) The Board has held that an employer is entitled to continue its policy of soliciting employee concerns, even though there is a union organizing campaign in progress.[12] *TNT Logistics North America, Inc.,* 345 NLRB No. 21, slip op. at 3 (2005).

[12] The one-to-one meetings, of course, were not a part of the policy.

In *Uarco, Inc.,* 216 NLRB 1, 2 (1974), cited approvingly in *TNT Logistics North America,* the Board stated "it is not the solicitation of grievances itself that is coercive and violative of Section 8(a)(1), but the promise to correct grievances...; the solicitation of grievances merely raises an inference that the employer is making such a promise, which inference is rebuttable by the employer. While the March 11 letter itself does not contain an explicit promise to remedy employee complaints, the reference to the one-to-one meetings, which were on-going around the same time, raises an inference that the Respondent was making such a promise because that was the purpose and intent of the one-to-one meetings (i.e., to find out what was broken and to fix it). The Respondent has not submitted any evidence to rebut that inference. To the contrary, the undisputed evidence shows that Orsulak took detailed notes of each one-to-one meeting (GC Exh. 34) from which he created a "to do" list of items affecting working conditions that needed to be remedied, and that the Respondent had already begun to correct many of those problems by the time the letter was mailed to the employees. (GC Exh. 21; Tr. 322-333.) Thus, I find based on the evidence viewed as a whole that the Respondent implicitly promised to remedy the employees' complaints, and in fact did remedy almost all of those complaints, which impressed on the employees the notion that union representation was unnecessary. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 8(b) of the complaint.

C. *The Respondent Focuses on Medley*

1. Medley is assigned work in the quarantine area

a. *Facts*

On March 15, 2004, Quality Assurance Manager Earlene Ross, who normally worked the first shift between 6:00 a.m. to 7 p.m. began working the third shift. (Tr. 342.) (Tr. 99, 159, 254-255.) Ross candidly testified that she went on the third shift because "we had the union campaign going on, and Bryant [the shift supervisor], we felt, could use some extra help on third shift...." (Tr. 343.) In addition, Ross stated that she went on the third shift because there were some "issues" concerning the shift supervisor and the employees reporting to him that needed to be worked out. (Tr. 343.) According to Ross, Medley had been telling her for over two months that the shift supervisor was spending too much time in his office and the shift associates needed training. (Tr. 343.) Ross testified that she therefore decided to work the third shift to see what she could do to support the shift supervisor and Medley. (Tr. 343.)

According to Medley, however, when Ross switched to the third shift, she changed his duties. (Tr. 151.) Medley testified that prior to March 15, Medley typically circled or "looped" through the production area 2-3 times a night checking on various aspects of production. Prior to March 15, there were no limits on how many loops he could make in a night or how long it should take to make a loop. [13] He estimated talking to 80 – 100 employees a night. (Tr. 101, 210-211.) Medley testified that after Ross joined the third shift, she told him (1) that he had to complete one loop by 12: 30 a.m. and upon completing that loop he had to report to the quarantine area to check defective parts;[14] (2) that he had to remain in the quarantine area

[13] Ross conceded that there were no set routines for QCIs on any shift and that QCIs responded to various production problems in the plant. (Tr. 339.) She also stated that although QCIs were not required to make 3 or 4 loops a night, they had to make at least one during their shift.

[14] The quarantine area is an open area in front of Ross's office. (Tr. 54-55,151,154.) Ross could observe Medley working in the area through a window in her office. (Tr. 55.)

unless he was called by a machine operator who was having machine problems or he was called to do a batch check at a mixer (Tr. 151, 347); (3) that after completing a task outside the quarantine area, he was to notify the shift supervisor and immediately return to the quarantine area; and (4) that he was not allowed to talk to any employees unless it was a work related issue. (Tr. 151.) In addition, Medley stated that whenever he left the quarantine area to respond to a problem, Ross would follow him to that area. (Tr. 151.)

Ross did not deny having Medley work in the quarantine area. She explained that she assigned Medley to the quarantine area so he would get some experience doing work he normally would not do on the night shift. (Tr. 347.) She also asserted that she assigned Medley to work in that area only 2-3 times between March 15 – April 7 (the date he was discharged). [15] (Tr. 348.)

Ross' explanation about why she assigned Medley to work in the quarantine area and her testimony about how many times he worked there after March 15 is dubious. She initially testified that when Medley first became a QCI she spent a great deal of one-on-one time training him in several areas, including the quarantine area. (Tr. 327.) Thus, contrary to the impression that Ross later sought to foster, the evidence shows that Medley had previously received some extensive one-on-one training in the quarantine area. Next, the evidence shows that Medley worked approximately six months as a QCI on the second shift before transferring to the third shift. (Tr. 96.) His experience therefore was not limited to third shift activity, but instead was broader than Ross' testimony would lead one to believe. In addition, Ross testified that quarantine parts were usually handled on another shift, which is consistent with Medley's unrebutted testimony that Ross had created a special position to inspect quarantine parts on the first shift. (Tr. 348, 153.) Thus, the need for Medley to learn how to inspect quarantine parts on the third shift in the middle of a union organizing campaign is also questionable. Finally, Ross' explanation for assigning Medley to the quarantine area is inconsistent with one of the reasons she gave for switching herself to the third shift, that is, to support the working relationship between the shift supervisor, Medley and the employees on the floor. Ross testified that Medley had complained for months that the shift supervisor was spending too much time in his office and greater interaction was needed with the employees. Inexplicably, Ross sought to address this problem by assigning Medly work in the quarantine area thereby restricting his interaction with the floor employees.

Equally questionable is Ross' assertion that Medley was assigned to work quarantine parts only a few times. At trial, Ross hesitated and equivocated when she responded to Respondent's counsel's question:

> Q. ...How often, in your estimation, is it that you would have Medley work in the quarantine area during that, during that time?
>
> A. It was a couple of times, a couple, three times.

(Tr. 348.)

She also did not explain how many hours Medley was required to work in that area each time she told him to work there. Nor did Respondent's counsel pursue this line of questioning with her. The lack of detail about how many days, and how long each day, calls into question her

[15] Ross also did not deny telling Medley to check-in with the shift supervisor when he returned to the quarantine area nor did she deny following Medley around the plant when he checked a batch or a machine.

very circumspect answers. The equivocation and lack of detail in Ross' testimony leads me to conclude that her "estimation" is not accurate.

In contrast, Medley was specific on this point. He testified on rebuttal "I worked the quarantine area every night from 12:30 a.m. to 7:00, yes, 12:30 a.m. to 7:00 a.m., unless I was called away for a batch check. I was there every night." (Tr. 427.) His testimony was also corroborated to an extent by Mixer Operator Sonja Turner, who stated that she worked overtime 2 or 3 times a week and saw Medley working by himself in the quarantine area.[16] (Tr. 255-256, 271.) The specificity with which Medley testified and Turner's partial corroboration makes his testimony on this point more credible.

In addition, Medley testified that Ross restricted his access to use the copy machine in the front office, after she switched to the third shift. (Tr. 151.) According to Medley, he was required to ask permission from Williamson or Ross to make a copy and one of them would escort him to the machine.

In contrast, Ross testified that access to the front office was limited for all production workers in late January or early February 2004 because employees were eating their lunches in the front office and making a mess. (345, 346.) She stated that a notice was placed on the door between the vendateria and the hall stating that the doors leading to the office would be locked at 5:00 p.m. (Tr. 346.) She also testified that anyone needing access to the front office to use the copy machine could see a supervisor to unlock the door. She denied that the change was made in order to prevent Medley from using the copy machine. (Tr. 346.)

No one corroborated the testimony of either witness on this point. The alleged conduct, however, is consistent with other aspects of questionable conduct by Ross, designed to closely monitor Medley's activities, such as transferring herself to the third shift shortly after Medley announced his union activity, assigning work to Medley in the quarantine area, which was located outside of Ross' office, having him check-in with the shift supervisor after he completed a task on the plant floor, and following Medley whenever he left the quarantine area. Because of the similar nature of the conduct, I find that it is more likely, than not, that Ross restricted Medley's access to the front office after she came onto the third shift. I therefore credit Medley's testimony on this point.

Finally, Medley testified that when Ross switched to the third shift she told him he was not to talk to other employees unless it was work related. (Tr. 150.) Ross denied telling Medley that he was not allowed to talk to other employees unless it was work related. (Tr. 331, 331-332.) Again, this type of directive is consistent with the pattern of conduct that Ross undertook to maintain tighter control of Medley, a known union advocate, during work hours. I therefore credit Medley's testimony on this point.

---

[16] On cross-examination, Respondent's counsel sought to impeach Turner's testimony on this point by reading from one of her four pretrial affidavits, to wit: "it says I saw, on a couple of occasions, Steve [Medley] sitting in the re-work area where bad blocks were checked by hand." (Tr. 271, 269-270.) Although her testimonies are not completely consistent, the disparity is not particularly great. In addition, I decline to rely on this segment of cross-examination for impeachment purposes because I do not know the context within which the statement was made in the pretrial statement and because Turner was not asked to explain the apparent inconsistency with her trial testimony. See Fed.R.Evid. 613 (b).

b. *Analysis and findings*

1. The 8(a)(1) violation

Paragraph 5(b) of the complaint alleges that on or about March 4, 2004, and on various unspecified dates thereafter, the Respondent through Ross promulgated an overly board no-solicitation rule by telling Medley that he was not allowed to talk to other employees unless it was work related.

I have credited the testimony of Medley and I find that by telling him that he could not talk to other employees unless it was work related, Ross promulgated a discriminatory no-solicitation rule because she did not prohibit employee conversation about other subjects during work hours. There is no evidence that the Respondent had a no-solicitation policy. None appears in the employee handbook. There is no evidence that any employee, other than Medley, was told not to talk to other employees unless it was work related. In addition, the rule was promulgated soon after Medley identified himself as the lead Union advocate and in conjunction with other unlawful restrictions imposed upon Medley because of his Union activity. Accordingly, I find that the rule was intended to discourage Medley from engaging in Union activity in violation of Section 8(a)(1) of the Act. *Emergency One, Inc.,* 306 NLRB 800, 806 (1992); *F. Mullins Construction,* 273 NLRB 1016, 1024 (1984).

Relying on *Sarkes Tarzian, Inc.,* 157 NLRB 1193, 1213 (1966), the Respondent asserts that even if Ross did promulgate a no-solicitation rule, no violation occurred because the rule was the never enforced. However, in *Sarkes Tarzian*, unlike here, the issue was whether the employer "disparately" promulgated and enforced a rule pertaining to the promulgation and communication of information on a locked glass enclosed bulletin board in the cafeteria. There, the credited testimony showed that the employer placed on an enclosed bulletin board all items requested, but that no prounion literature had been given to post on the board. Because there was no evidence showing that the employer refused to post any campaign propaganda or prounion literature on the bulletin board, there was no evidence showing that the board was used in a discriminatory manner. Similar circumstances do not exist here.

Finally, whether the rule actually impeded Medley's union activity is not of consequence. The promulgation of the "no talking" rule, standing alone, unlawfully interferes with Medley's Section 7 rights because it was intended to discourage and impede protected activity. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 5(b) of the complaint.

2. The 8(a)(3) violation

Paragraph 9 (a) and (b) allege that the Respondent, through Ross, unlawfully isolated Medley and also subjected him to closer supervision.

In *Wright Line, a Div. of Wright Line, Inc.,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board established an analytical framework for deciding discrimination cases turning on employer motivation. The General Counsel must persuasively establish that the evidence supports an inference that union activity was a motivating factor in the employer's decision.[17] Specifically, the General Counsel must establish union activity, knowledge, animus or hostility, and adverse action, which tends to encourage or

[17] *In re Manno Electric, Inc.,* 321 NLRB 278, 280, fn. 12 (1996).

discourage union activity. *Farmer Bros. Co.,* 303 NLRB 638, 649 (1991). Inferences of animus and unlawful motive may be inferred from the total circumstances proved and in some circumstances may be inferred in the absence of direct evidence. *Fluor Daniel, Inc.,* 304 NLRB 970 (1991). Once accomplished, the burden shifts to the employer to persuasively establish by a preponderance of the evidence that the reasons for its decision were not pretextual or that it would have made the same decision, even in the absence of protected concerted activity. *T&J Trucking Co.,* 316 NLRB 771 (1995).

The undisputed evidence shows that Medley was the principal Union advocate and that his role in seeking to organize the Respondent's employees was known to management, including his immediate supervisor and the Company human resources manager. The evidence also shows that the Respondent opposed the Union's efforts to organize. In addition, the evidence shows that soon after Medley disclosed his union activity to Ross and Orsulak, Ross switched to the third shift admittedly because of the union campaign. She also assigned Medley work in the quarantine area where he could be easily observed from her office, required him to check with the shift supervisor after making a loop through the plant, and positioned herself in areas adjacent to where Medley was performing other aspects of his job. This evidence supports a reasonable inference that the Respondent opposed Medley's union activity.

The evidence falls short, however, of showing that the Respondent "isolated" Medley from other workers in the plant. Although it is undisputed that he was assigned work in the quarantine area, and that he performed that work alone, the evidence also shows he continued to perform his other QCI duties, making loops, responding to mixer operator calls, and checking equipment. In the course of doing so, he interfaced with other employees on his shift, albeit not as often. The evidence viewed as whole nevertheless shows that Medley was not "isolated" from the other employees. Accordingly, I shall recommend the dismissal of the allegations in paragraph 9(a) of the complaint.

On the other hand, the credible evidence shows that Ross switched to the third shift because of Ross' union activity, assigned him work in an area immediately outside of her office, required him to check-in periodically with the shift supervisor, positioned herself in areas of the plant where she could see him and he could see her as he worked, and restricted his access to the plant front office, unless accompanied by a supervisor. Thus, the evidence viewed as a whole shows that after announcing his support for the Union, Medley was subjected to closer supervision in order to discourage and interfere with his union activity. Accordingly, I find that the Respondent violated Section 8(a)(3) of the Act as alleged in paragraph 9(b) of the complaint.

2. Medley's second discussion with Ross about the Union

a. *Facts*

On or about March 20, 2004, Ross and Medley were working together on an ultrasonic tester in the quality control lab.[18] (Tr. 158.) While they were working, Medley initiated another conversation with Ross about the Union telling her why he thought the Union would be good for the employees. She disagreed telling him why she thought the Company did not need a union. Medley characterized the conversation as a rehash of the prior conversation that they had about "her working in a company that had a Union." (Tr. 159.) He stated that at some point Ross

[18] On March 16, 2004, the Union filed a petition for election seeking to represent a collective-bargaining unit of 81 employees. (GC Exh. 31.)

asked him "why do you think you have to be a leader for these people?" (Tr. 159-160.) As Medley testified:

> And I asked her what she meant by that and she said, you know, you don't need to lead these people. Do you think they're stupid? And I, of course, replied, no, I don't think they're stupid.
>
> I just think that they don't – were never given the information that they needed to make an informed decision, and that they never really had anybody that they could believe in or trust within this company that would stand up for them.
>
> And, you know, she told me again that, you know, you don't need to be that person. You need to let them make up their own mind. And that was basically the end of the conversation.

(Tr. 160.)

Medley elaborated further that Ross repeated:

> Again, basically, you know, she just said that the Union wasn't going to come in there and be able to fix any of the problems that we had. You know, they weren't going to be able to come in there and get people pay raises, or you know, extended time off.
>
> People were still going to have to do their jobs. You know, that was basically it. It was basically a down play of what the Union could and could not do and specifically, again, the UAW.

(Tr. 160 -161.)

Ross could not recall specifics of any particular of discussion with Medley in the quality control lab in March 2004. (Tr. 332.) She explained that she had many discussions in the quality control lab with Medley and could not remember every date that they spoke in the lab. (Tr. 332.) She denied telling Medley that having a union was futile or that there was nothing that a union could do to fix problems at Motion Control. (Tr. 327-328.) She reiterated that she only related to him her experiences working for a unionized employer. (Tr. 328-329, 330-331.)

In addition, Ross denied telling Medley to stop engaging in union activities. When asked if she ever told him he should not be a leader in the organizing drive, she vaguely responded:

> No. The discussions I had with Mr. Medley were very broad, general, why we were showing him things in the lab, you know, test equipment and things to do, and just broad general that, you know, statements that not everybody appreciates when somebody is trying to do things for them. So that's all.

(Tr. 336.)

The Respondent's counsel argues that it is questionable whether the conversation ever occurred. He points out that there was no reason for Medley to re-initiate the same conversation with Ross that he had a month earlier because Ross had told him about her less than positive experiences as a union member. He also asserts that it is unlikely that Medley would initiate

such a conversation with Ross because by this time he no longer trusted her. Indeed, Medley, himself, testified that in early March, when he met with Orsulak and Ross to announce that he was a Union advocate, he asked to have another employee present because he no longer trusted Ross. In addition, by mid-March, Ross had switched to third shift and placed Medley under closer supervision. Thus, Respondent's counsel asserts that under these circumstances it is unlikely that Medley would engage Ross in a one-to-one conversation about the Union.

However, Ross did not deny having such a conversation with Medley in the quality control lab in March 2004. Rather, she testified that she could not recall a conversation or any specific conversation at that time or place. Although she generally denied ever telling Medley not to engage in union activities, she conceded in answer to Respondent's counsel's abstract question that at some point she made "statements [to him] that not everybody appreciates when somebody is trying to do things for them." Her testimony was vague and selective on this point.

In contrast, Medley's account of the conversation was direct and detailed. He narrated the substance of the conversation with ease. In response to the general question, "who said what during your conversation with Ms. Ross," he candidly stated that Ross reiterated the reasons for which she believed a union would not be good for the employees and pointed out that her response was based on prior experience with a union. I therefore credit his account of the conversation.

b. *Analysis and findings*

Paragraph 5(c) of the complaint alleges that during this conversation Ross unlawfully implied that it was futile to select a union because it could not do anything for the employees. The undisputed evidence shows that Medley initiated the conversation, which he testified was a "rehash" of what he and Ross discussed one month before. He pointed out that Medley explained that her perception of unions was based on her personal experience as a former union member. As stated in Section B.3.b above, I find that Ross was stating her personal views as protected by Section 8(c) of the Act. Accordingly, I recommend the dismissal of the allegations of this paragraph of the complaint.

Paragraph 5(d) of the complaint alleges that during this conversation Ross unlawfully discouraged Medley from engaging in union activity by telling him that he did not need to lead the Union organizing drive. In its posthearing brief at page 30, the General Counsel asserts that "Ms. Ross' statements that Medley did not need to lead the employees reasonably tends to coerce employees from exercising the § 7 rights as an implied threat." It is further asserted that the Board will determine whether the comments are unlawful by considering all of the surrounding circumstances, including contemporaneous unfair labor practices. In the latter connection, the General Counsel argues that although Ross' comment was vague, it nevertheless was coercive when considered in context of the events surrounding the statements, e.g., the team talks, the March 11 letter, the one-to-one meetings, and the closer supervision of Medley.

In support of this position, Counsel for the General Counsel relies on *Debbie Reynolds Hotel,* 332 NLRB 466 (2000); *Magnesium Casting Company, Inc.,* 259 NLRB 419 (1981); and *Greensboro Hosiery Mills,* 162 NLRB 1275 (1967). A careful reading of those cases reveals that none is factually applicable here.

In *Debbie Reynolds Hotel,* the "Respondent took drastic, immediate, and persistent measures to thwart its employees' support for the Union in the representation election. This unlawful course of conduct began even before the petition was filed and escalated quickly after the filing. It reached its peak with the commission of several "hallmark" violations, including

subcontracting out most of the unit work and laying off most of the unit employees, discharging [two employees who supported the union], and repeatedly threatening job loss and closing, and continued even after the election." 332 NLRB at 467. The threats were express and the comments were not vague. There, unlike here, the unlawful conduct warranted a *Gissel* bargaining order.[19]

In *Magnesium Casting Company, Inc.,* supra, 259 NLRB at 422, a supervisor, while discussing the possibility of an employees' transfer, told the employee that it would be in his best interest to keep a low profile regarding union activities. The administrative law judge concluded that the supervisor's words imparted fear that the employee's transfer might not be granted because he was active on behalf of the Union. "The clear implication of [the supervisor's] comment is that continued activities by [the employee] would prevent or impede his transfer." 259 NLRB at 423. In the instant case, Ross did not threaten Medley or even hint that some detriment to Medley would result if he continued to lead the organizing campaign.

In *Greensboro Hosiery Mills, Inc.,* supra, 162 NLRB at 1276-1277, the employer posted several unlawful coercive posters, one of which advised employees that "if this [u]nion were to get in here, it would not work to your benefit but, in the long run, would itself operate to your serious harm." The Board held that the unspecified nature of the harm, coupled with the employer's statement that he had a "serious belief" that the harm will occur, carried an implied threat of reprisal which in their tendency as well as their design operate to restrain and coerce employees from exercising their rights protected by the Act. Again, however, in the instant case there is no evidence of an implied threat of reprisal. Instead, Counsel for the General Counsel seeks to infer coercion based on the Respondent's other conduct which, aside from closely supervising Medley and telling him to talk about work related items only, was rather limited in scope and not specific to him.

That notwithstanding, I do not agree with the General Counsel that it is necessary to infer coercion from the surrounding circumstances in order to find a violation. Rather, I find that Ross' spoken words on their face had a tendency to interfere with Medley's Section 7 rights because they sought to discourage him from engaging in union activity. Ross' statement to Medley "you don't need to lead these people" could have no other intended purpose than to discourage him from continuing to advocate for the Union. There is no evidence, nor can it be inferred from the evidence, that Ross' remarks where based on her prior union experience and therefore they fall outside the protective parameters of Section 8(c).

Thus, I find Ross' remarks to Medley that he did not need to lead the employees in the union organizing drive were unlawful because they tended to discourage his participation in activities protected by Section 7 of the Act. Accordingly, I find that the Respondent violated the Act as alleged in paragraph 5(d) of the complaint.

3. Batch 432 and Medley's discharge

a. *Facts*

On April 6, 2004, Mixer Operator Mathew Sheppard worked the third shift, along with QCI Steven Medley. (11:00 p.m. – 7:00 a.m.) As a mixer operator, Sheppard was responsible for reviewing the batch sheets and pre-staging the batch ingredients along the conveyer belt

[19] *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969).

leading to the mixer.[20] (GC Exh. 8.) One ingredient on April 6 was a S1025 super sack of reclaimed dust, which typically is added to batches.[21] The super sack dust is placed in a cone hopper by forklift and dispensed into the mixer by a computerized controller, which is programmed by the mixer operator. (Tr. 31, 109.) After the QCI signs off on the blend sheet, the mixer operator presses the "start" button on the controller and then the "green" button on the scale to allow the super sack dust to weigh into the mixer. (GC Exh. 9.) When the required amount of reclaimed dust empties into the mixer, a small ticket, much like a cashier register, is printed out of the controller. (See GC Exh. 5B.)

On April 6, Sheppard lined up batches 430, 431, and 432 of formula 5011 for mixing and called Medley for a batch check.[22] (GC Exh. 3A, 4A, and 5A.) The evidence shows that Medley checked the batches and signed off on all three batches at approximately 1:05 a.m., thereby authorizing Sheppard to run all three batches sequentially. (Tr. 114 -115, 121.)

With batches 430, 431, and 432 moving toward the mixer, Sheppard lined up the ingredients for two more batches of formula 5011, i.e., batches 433 and 434, and called Medley for another batch check. (GC Exh. 6A and 6B.) As batch 432 was being added to the mixer, the super sack dispensed 392 pounds of S1025, ran out of dust, and had to be changed. (GC Exh. 5(b).)

Medley testified that Sheppard called for him to check batches 433 and 434 at approximately 1:30 – 1:40 a.m. (Tr. 123-124.) When Medley arrived at the mixing area, he doubled checked the printer tickets for batches 430 and 431, as he was required to do, in order to make sure that the proper amount of reclaimed dust was added to those batches. [23] Medley further testified, however, that when he went to check the ticket for batch 432, the ticket was not there. (Tr. 165.) He stated that "[t]he supersack dust was sitting on the floor and it was in the middle of being changed. So at that point, as I was trained to do, I went ahead, verified everything was set up correctly for 433 and 434, and continued to do my job." [24] (Tr. 165.) The evidence shows that Medley signed off on batches 433 and 434 at approximately 1:50 a.m., and left the mixing area.

In the meantime, Sheppard finished changing the super sack for batch 432, reprogrammed the controller, and added more reclaimed dust. In the course of doing so, however, he made an arithmetic error and programmed the controller to add 555 pounds of dust, which was 97 pounds too much. (Tr. 121; GC Exh. 5(b) and (c).)

---

[20] One or more batches could be sequentially run off the same conveyor belt into the same mixer.

[21] A by-product of grinding brake linings is "reclaimed" dust that is collected and bagged in either 50 pound bags or a "super sack" which weighs approximately 1800-2000 pounds and is approximately 7 feet high and 7 feet wide. (Tr. 22.)

[22] Each batch required 850 pounds of S1025 super sack dust, which meant that one super sack would have been sufficient to complete two batches.

[23] The evidence shows that when the controller prints out the ticket, the mixer operator staples the ticket to the blend sheet.

[24] Medley stated that a good operator could change a super sack in 10 minutes. (Tr. 162.) While he did not know how long it took Sheppard to change the super sack for batch 432, he testified that typically it took Sheppard 20-30 minutes to make a change. (Tr. 126.) More significantly, he testified that he had been trained and told by supervisors and other QCIs that if a super sack had to be changed he should not wait for the operator to finish changing the bag. Instead, he should checkoff subsequent batches, allow the mixer operator to continue to run, and when he returned for a subsequent batch check, reverify the tickets. (Tr. 164.)

Later that shift, the press area reported that material was cracking and not curing properly. (Tr. 161.) Medley testified that he went to the press area, checked the press temperature, mold temperature, and oil pressures in attempt to isolate a problem in the press area. While in the process of doing that, Sheppard called him again to check a batch of formula 5235 material. (Tr. 161-162.) Medley testified that when he returned to the mixing area, he decided to check the blend sheets for batches 430 - 433 "because, you know, there's always a chance for a mistake that you missed something ... [a]nd, plus, he had had a dust sack – a supersack change of dust that had not been re-verified yet, so my first step was immediately to pull those blend sheets, check the tickets, and make sure that everything was correct." (Tr. 162.) Medley stated "[w]hen I got to the mixing area, I found what you have listed as General Counsel Exhibit 5(c) laying on the table. My first – the first thing I saw was the numbers 392 and 555, adding up to 847. And just by looking at that, I knew it was immediately wrong." (Tr. 162.) Medley testified that he found the ticket, saw the numbers, and realized that was the source of the problem at approximately 2:00 a.m. (Tr. 121.)

According Medley, he stopped production, brought the mistake to Sheppard's attention, and reported it to the third shift supervisor Williamson.[25] (Tr. 163.) He and Williamson quarantined batches 430, 431, and 432. When Ross arrived at approximately 7 a.m., Medley spoke to her outside of her office telling her that there was a problem. They went into her office where he told her that Sheppard had mixed some bad batches. (Tr. 166.) There are two versions of what transpired next.

Medley testified that after he entered Ross' office he told her that Sheppard put an extra 97 pounds of dust into a batch. Before he could say another word, Ross told him to get out of her office. (Tr. 166, 174.) According to him, their conversation lasted 30 seconds.

Ross testified that when she came to work on April 6, she saw biscuits and slabs of formula 5011in the quarantine area. (Tr. 363.) She told Medley to gather his paperwork from the night and bring it to her office. Ross testified that while she was looking over the paperwork, Medley told her that he was called to the cure press area because the slabs were cracking. Medley told her that he went to the mixing area where he noticed on a piece of paper that the mixer operator had made a math error causing 97 extra pounds of dust to be added to the blend. (Tr. 364.) Ross further testified that she asked Medley if he had checked the tickets when he went back to check the other batches (430 and 431) and he responded, "no, he didn't." (Tr. 364.) At that point, she asked him to leave her office. She testified that their meeting lasted approximately 20 minutes. (Tr. 377.)

Ross further testified that she reviewed all the batch sheets and quarantine tickets, and spoke with the third shift supervisor, Bryan Williamson, and production manager, Fred Allen, to find out what they knew about the incident. Afterwards she asked Medley to come to her office, where he told her for the first time that he could not double check batch 432 when he double checked batches 430 and 431 because the mixer operator was printing off the batch ticket. (Tr. 365.) Ross concluded that Medley had changed his story and that he should have waited for the ticket to print. (Tr. 366.)

In addition, Medley testified that later that morning, as he was standing outside the quality control lab, Ross approached him stating, "I need to see all your paperwork." (Tr. 167.) He was holding a clipboard with about ½ inch stack of paper. On top of the stack was a quality

[25] Medley stated that he went over everything with Williamson step-by-step because he knew that he had to watch his P's and Q's because of his Union activity. (Tr. 163.)

control inspector sheet and underneath it were some drill patterns, product codes, and other work related documents. On the very bottom was a Union flyer. (Tr. 168.) According to Medley, Ross abruptly took the clipboard away from him, flipped through the papers, took the Union flyer, handed the clipboard back to him, and walked away with the flyer. He stated that he called out to Ross, "[H]ey, that's mine." She kept walking, but replied, "I'll be back." Medley testified that 20 minutes later Ross returned the flyer to him whereupon he said, "are you done with it? Would you like a copy of it so that everybody can read it? And she said, no, they'd already read it." (Tr. 168-169.)

Ross did not deny taking the clipboard. She testified that she asked Medley if she could see his clipboard because she noticed that the documents on the board appeared to be out of date. As she flipped through the papers, she came across the flyer on the bottom. Ross testified that there were scribbles on the flyer and that she was not sure what it was. She asked Medley, "what's this? And he said, oh, that's mine, it's personal. He said, but, if you want to read it, go ahead." (Tr. 337.) Ross stated that she took all the papers back to her office, looked at the flyer, and gave it back to Medley. She denied that she took the flyer without his permission and further denied that Medley asked for the flyer back. (Tr. 338.)

After Ross concluded her review, she met with Norman Tarbell, Fred Allen, and Ron Kramer, the acting plant manager, to discuss what occurred. (Tr. 368.) The unrebutted evidence shows that they reviewed the personnel files of both Sheppard and Medley, and the Respondent's progressive discipline policy, to determine the proper disciplinary action.[26] (Tr. 368; GC Exh. 2 at 12-13.)

Medley's disciplinary record disclosed that on December 1, 2003, while working as a second shift QCI, he received a written warning for failing to ensure that the proper edge code was placed on brake linings. An edge code allows the Respondent to track a product through production and to trace it in the event of a recall. (Tr. 350.) Medley missed an incorrectly numbered edge code causing 5,560 pieces of product to be incorrectly coded. (Tr. 350-351; R. Exh. 6, 10.) Brian Staples, the third shift QCI, also failed to catch the same error. He received a one-day suspension. (Tr. 354-356; R. Exh. 9, 10.)

Approximately one month later, on January 20, 2004, Medley received a one-day suspension for signing off on four batches with the wrong fiberglass component. (Tr. 197, 357; R. Exh. 13, 21.) All four batches of material had to be quarantined. (Tr. 358.)

Ross testified that Kramer left the meeting. She, Tarbell and Allen decided to terminate both employees based on the severity of the mistake and their prior disciplinary records. (Tr. 370.) The following day, April 7, Tarbell and Ross met with Medley. (Tr. 175.) Medley testified that Tarbell gave him the opportunity to explain what occurred the night before. When he finished, Tarbell terminated him. (Tr. 176.) Medley stated that Tarbell did not tell him that the termination was based in part on his prior disciplinary record. (Tr. 396.)

b. *Credibility resolutions*

I credit Ross' unrebutted testimony that some of the papers on Medley's clipboard were outdated and therefore she took the clipboard from him. I further credit her testimony that she took all the papers back to her office and that Medley did not object to her taking the flyer, which

[26] The evidence shows that on January 30, 2004, Matthew Sheppard received a one-day suspension for running a batch with a missing trace component. (Tr. 393; R. 21.)

was on the bottom of the stack. It is implausible that Ross would return the outdated papers to Medley, because that would have been counterproductive. It is also implausible that Medley would object to Ross taking the flyer. By this time, Medley had twice initiated conversations with Ross about the Union during which he sought to convince her that the employees would benefit from having a Union. Medley knew that Ross knew he was leading the Union organizing drive, so it is unlikely that he would he object to her reading a flyer that was intermixed with his work papers. I do not credit Medley's account of what occurred.

In addition, Medley's testimony about whether he had an opportunity to explain to Ross about the extra 97 pounds of reclaimed dust is dubious. He testified that he initially told Ross outside her office that Sheppard ran some bad batches whereupon she said, "let's go into my office." (Tr. 166, 174.) Once inside the office, Ross asked him, "what's the problem?" and he explained that Sheppard had added an extra 97 pounds of reclaimed dust to a batch. According to Medley, Ross immediately told him to get out of her office, so he left, and they never discussed the matter again. (Tr. 167.) It is hard to believe that one minute Ross would ask Medley to come into her office and then seconds later tell him to leave without getting a detailed explanation of what occurred. The evidence shows that Ross and Medley were accustomed to having candid exchanges and that she was not reluctant to ask questions. It is more likely, than not, that Ross sought more information from Medley, rather than abruptly cutting him off.

Indeed, Medley later contradicted himself and equivocated on the extent to which he and Ross went "over stuff" in her office. He was asked by Counsel for the General Counsel:

> Q. Just to be clear for the record, if I understood you correctly, you have the thirty-second conversation with Ms. Ross, where she kicks you out of her office, and then she comes back and takes your clipboard, but she never asks you again what happened or your version of events?
>
> A. Yeah. To my knowledge, there was never a sit down discussion in her office about what happened that night. I may have spoken to her that morning and she may have asked me to go over stuff, but there was never any specific instance of her calling me into her office to have that discussion. I don't recall that.

(Tr. 180.)

His testimony adds further doubt of what he told Ross about the extra 97 pounds of reclaimed dust and where the conversation took place.

On rebuttal, Medley implied that contrary to his earlier denial, he did talk to Ross about the incident a second time. He was asked:

> Q. Mr. Medley, when you discussed the incident of April 6th with Ms. Ross, you heard her testify that you gave her one story, then you came back and told her a different story. Is that what happened, sir?
>
> A. No, sir. I was not given a chance to even explain the story the first time, so there's no possibility that I could have changed anything, because she only heard one story.

(Tr. 427.)

If Medley did not have an opportunity to explain the story the first time, as he asserts, then when else could Ross have heard the story? Medley's answer implies that after the initial discussion he spoke again with Ross about the incident, which contradicts his earlier testimony that he did not have any subsequent discussions with Ross after the initial conversation. (Tr. 167.)

Based on Medley's contradictory, equivocal, and unconvincing testimony. I do not credit his assertion that Ross did not review the incident with him or give him an opportunity to explain what occurred. Rather, I credit Ross' testimony that she spoke with Medley twice on April 6 about the incident and that in the first discussion he stated that he did not check the ticket for batch 432 and in the second discussion he stated that he could not check the ticket because it was still printing out.

Equally unconvincing is Medley's explanation for why he did not wait for the ticket to print out before leaving the mixing area. Medley did not deny that he was required to double check the tickets for the super sack dust for batches 430, 431, and 432, when he was called back to batch check 433 and 434. (Tr. 122.) Rather, he testified that when he went to check the ticket for batch 432, it was not there. (Tr. 165.) He stated that "[t]he supersack dust was sitting on the floor and it was in the middle of being changed. So at that point, as I was trained to do, I went ahead, verified everything was set up correctly for 433 and 434, and continued to do my job." (Tr. 165.)

However, Medley did not state that he attempted to double check the ticket for batch 432 after signing off on 433 and 434 or explain why he could not do so. The undisputed evidence shows that all the batches of formula 5011 ran in sequence along the conveyor belt (i.e., 430, 431, 432, 433 and 434). Thus, waiting for the ticket to print or even waiting for Sheppard to complete the super sack change for batch 432, after Medley had signed off on batches 433 and 434, would not have held up production because nothing behind batch 432 could be run until the change was completed.

Indeed, Medley's testimony shows that he would have had to wait less than 10 minutes to double check the ticket for batch 432. He stated that he signed off on batches 433 and 434 at 1:50 a.m. and left the mixing area. (Tr. 124.) He further testified that when the cracking problem was reported he returned to the mixing area where he first saw the ticket for batch 432 at approximately 2:00 a.m. (Tr. 121.) Thus, the evidence supports a reasonable inference that Medley would have had to wait less than 10 minutes for the ticket to print. It also supports a reasonable inference that the ticket was available for review at 1:50 a.m. or within a few minutes of that time, but Medley did not attempt to check for the printed ticket after signing off on batches 433 and 434.

Nor does the evidence show that Medley was compelled by Company policy to leave the mixing area, after signing off on batches 433 and 434, without waiting to double check the ticket for batch 432. Certainly the rambling and convoluted testimony of General Counsel witness, Sonja Turner, does not establish that it was Company policy not to wait to double check a ticket after signing off on subsequent batches down the line. (Tr. 240 – 242.)

A mixer operator, and Union advocate, Turner testified about her experience working with second shift QCI Donald Pritchett. She testified that if she was changing a bag, when Pritchett came over to do a batch check, he might "hang around and wait till I change the sack.

He might walk away, come back later." [27](Tr. 246.) She added that he might check subsequent batches that are ready for batch check, and he might walk away, then come back to give her another batch check. (Tr. 246 -247.) Asked a second time to explain what Pritchett might do if she was changing a bag, Turner testified that he would move down the line checking the batches of what she had lined up. (Tr. 250.) She did not state when he would come back to double check the bag she was changing. Her testimony fails to support a reasonable inference that after checking batches 433 and 434, Company policy dictated that Medley leave the mixing area without re-verifying batch 432.

Nor does the testimony of Kenneth Bundy, a former employee, who worked as a second shift quality control inspector,[28] show that it was against Company policy for Medley to wait to double check batch 432, after signing off on batches 433 and 434. He testified "when I was called back to make a batch check, before I would sign off on anything else, I would go over to the table and check" the super sack ticket. (Tr. 286.) Bundy was asked to read Ross's account of what transpired on April 6 (GC Exh. 11) and then asked if he ever had a similar situation to what is described in that document. He responded, "No." (Tr. 287.) Counsel for the General Counsel then asked him if he ever had a situation "where an operator had batches lined up on the belt and you signed the blend sheets, but, for whatever reason, one of those batches is not complete?" He stated, "yes" and continued by explaining that when he has been presented with that situation he told the mixer operator "that I couldn't sign off on it until he checked the line to make sure all the ingredients were on the line." (Tr. 287-288.) In response to another leading question, Bundy stated, "No," he would not be able to sign off on blend sheets from other batches that are on the line, if the third batch of the prior three batches was not complete. (Tr. 288.) Counsel for the General Counsel pressed Bundy further asking him if the operator was in the process of cutting that batch [i.e., the third batch]" what would Bundy do? Bundy responded: Well, when I come over, if he calls for a batch check and I came over there, and he's cutting that batch in that's unfinished, I would stop him right there, you know, to check to see if I can do another batch check." (Tr. 289.) His testimony shows that he would not allow the mixer operator to proceed with the subsequent batches until the prior batch was completed, which contradicts Medley's testimony.

Finally, Bundy was shown the blend sheets for batches 432, 433, and 434. (GC Exhibits 5(a), 6(a) and 7(a). He testified if batch 432 had been signed off, but was not cut when he was called back to sign off on batches 433 and 434, he would go ahead and sign off on the latter two batches because if he waited to do that it would slow the process up. (Tr. 290.) Bundy did not testify, however, that he could not or would not double check batch 432 again after he completed the batch check for 433 and 434 nor did he testify that he would not wait for a ticket to print if the dust was being added.

Neither the testimony of Medley, Turner or Bundy show that after signing off on batches 433 and 434, Company policy required Medley to leave the mixing without double checking batch 432. Nor is there any other evidence which would support such an assertion.

Medley's testimony of when he actually signed off on batches 433 and 434 and when he reviewed the ticket for batch 432 casts further doubt on his explanation. According to Medley, he signed-off on batches 433 and 434 at 1:50 a.m. and left the mixing area without reverifying

---

[27] That testimony contradicts Medley's assertions that QCIs routinely continued down the line instead of waiting for a sack change.

[28] The evidence shows that Bundy quit his job with the Respondent shortly after he was told that he would receive a third disciplinary action.

batch 432. He subsequently was told that material was cracking in the press area. He went to the press area, checked the press temperature, the mold temperature, the oil pressures, and made sure the cycles were correct. (Tr. 161.) Medley stated that while in the press area, Sheppard radioed him to return to the mixing area to sign off on two batches of a different material, formula 5235, so he returned to the mixing area. Because of the material cracking problem and because he knew that batch 432 had not been re-verified, he decided to check the blend sheets for the formula 5011 material. (Tr. 164.) Medley stated that when he got to the mixing area he found the printed ticket for batch 432 laying on the table and immediately saw that the math was wrong. (Tr. 162; GC Exh. 5(c). Medley testified that he discovered the math error "probably close to 2 o'clock maybe a.m." (Tr. 121.)

It is implausible that so much could have happened in 10 minutes or less. Sheppard would have had to complete the bag change, weigh in the dust, and send batch 432 down the line through not one, but four other areas. Indeed, Medley testified that after a batch is mixed, it must be preformed, cured, ground, and drilled. (Tr. 125.) While it is possible that Medley could be wrong on the time that he found the printer ticket for batch 432, it is equally possible that the bag change was completed and that the ticket for batch 432 was on the table when Medley finished checking batches 433 and 434 at 1:50 a.m., but he did not look for the ticket on either the blend sheet or the table before leaving the mixing area. I am therefore skeptical about the timing of the events as related by Medley.[29] I am also skeptical of Medley's testimony that in the middle of troubleshooting a serious problem he was coincidentally called back to the mixing area by Sheppard and upon arriving there he coincidentally found the printed controller ticket lying on the table.

Notably, the one person who could corroborate Medley's account of what transpired that night and when it occurred was not called by the General Counsel as a witness at trial: that is, Mathew Sheppard. Although Sheppard no longer works for the Respondent, because he was fired along with Medley for the April 6 incident, it is troubling that he was not subpoenaed by the General Counsel as a corroborative witness. Nor was any reason given for not doing so. While I do not draw an adverse inference from his absence, it unmistakably is a missed opportunity for the General Counsel possibly to bolster Medley's credibility concerning a crucial part of his testimony.

Based on the evidence viewed as a whole, I find that Medley's explanation at trial of what he did, when he did it, and why he did it, is unpersuasive.

c. *Analysis and findings*

1. The alleged unlawful confiscation

Paragraph 5(e) of the complaint alleges that on April 6, Ross unlawfully confiscated a Union flyer from Medley. Section 8(a)(1) prohibits an employer from interfering with an employee's right to receive union literature. *Romar Refuse Removal,* 314 NLRB 658, 665 (1994). In most cases where violations have occurred, the employer has taken away union flyers from someone passing them out or taken away union materials from someone who has received it. See, e.g., *St. Francis Medical Center,* 340 NLRB 1370, 1382 (2003); *Fresh Farm,*

[29] At trial, Medley also asserted that the printer ticket clock was off on April 6. While Turner testified that sometimes the printer ticket clock or date is off, there is no corroborative evidence that the clock was off on April 6. Nor is there any evidence that Medley told Ross that the clock was off when he told her the "story" about the extra 97 pounds of dust. I therefore do not credit Medley's testimony on this point.

305 NLRB 887, 888 (1991); *Alson Knitting, Inc.,* 301 NLRB 758, 760 (1991). In this case, neither occurred.

Medley was not passing out flyers to anyone when Ross found the flyer on the bottom of a stack of papers on his clipboard. There is no evidence that he intended to distribute the flyer. Nor is there any evidence that Medley had received the flyer from someone else.

In addition, there is no evidence that Ross sought to examine the clipboard because she suspected that it contained union material. To the contrary, Medley testified that Ross asked to see his papers in the course of determining why the extra 97 pounds of dust was added to batch 432 and in the course of doing so she discovered the flyer. In other words, the evidence shows that there was a legitimate reason for examining the clipboard and for taking the papers that were attached to it. Finally, the undisputed evidence shows that 20 minutes later, Ross returned the flyer. Thus, the evidence fails to show that the Union flyer was taken in order to interfere with Medley's right to receive or pass out union literature or that the taking of the flyer tended to interfere with that Section 7 right. Accordingly, I shall recommend the dismissal of the allegations of paragraph 5(e) of the complaint.

2. The alleged unlawful discharge

Paragraph 10 of the complaint alleges that Steven Medley was unlawfully terminated because of his union activity. Whether the discharge violated Section 8(a)(3) of the Act is governed by the test articulated in *Wright Line,* supra. The elements commonly required in order for the General Counsel to make an initial evidentiary showing have already been discussed. Suffice it to say there is ample evidence that the Medley was a known union advocate whose union activities the Respondent sought to discourage by closely supervising him and telling him that he did not need to lead the employees in the organizing campaign. Thus, the evidence shows that there was union activity, employer knowledge, and antiunion animus.

The General Counsel does not deny that a production problem occurred on April 6. Instead, it asserts that the Respondent seized upon the incident to terminate Medley because the union election was less than four weeks away. In support of its position, it argues that Ross did not give Medley an opportunity to explain what happened. That argument fails based on the above credibility resolution. It also fails because there is no evidence showing that Ross failed to consult anyone else before disciplinary action was taken. The General Counsel nevertheless asserts that the evidence supports a reasonable inference that there was no deliberation because Norman Tarbell was unable to recall specifically when and where he spoke with Ross, Allen, Williamson and Kramer. (Tr. 391 – 392.) While that evidence raises some questions about Tarbell's ability to recall, standing alone, it does not support a reasonable inference that the decision was made summarily.

On the other hand, a careful review of the past disciplinary actions of Medley, Staples, and Bundy does support such an inference. R. Exh. 6 shows that Medley was given a written warning on December 1, 2003, for an incident that occurred on November 21, 2003. R. Exh. 9 shows that QCI Staples received a one-day suspension on December 1 for the same incident. In other words, almost two weeks lapsed before discipline was issued. R. Exh. 13 shows that on January 20, 2004, Medley received a one-day suspension for an incident which occurred on January 13, 2004. R. Exh. 29 shows that on January 20, 2004, Bundy received a written warning for an incident that occurred on January 15, 2004. R. Exh. 30 shows that on February 3, 2004, Bundy received a one-day suspension for an incident that occurred on January 22, 2004. Thus, the evidence viewed as a whole shows that in most instances the Respondent took 1 – 2 weeks to issue discipline, where in this case it took less than 24 hours. That evidence, coupled with the fact that the union election was less than two weeks away, and also that

Medley was recognized by the Respondent as the employee leading the union organizing drive, supports a reasonable inference that the discharge was motivated by Medley's union activity. I therefore find that the General Counsel has satisfied its initial *Wright Line* evidentiary burden.

In order to prevail, the Respondent must establish not merely that it had a legitimate reason for discharging Medley, but that it actually would have done so, even in the absence of his union activity. The Respondent does not argue that Medley should have caught the mistake when it happened. Rather, it asserts that Medley could have, and should have, caught the mistake sooner than he did, if he had double checked batch 432 when he returned to check batches 433 and 434. In this connection, a review of the printer control ticket for batch 432 shows that the entire amount of super sack dust for that batch dispensed at 1:30 a.m. and a review of the blend sheets for batches 433 and 434 shows that Medley signed off on those batches at 1:50 a.m. Thus, the documentary information available to Ross and the others showed that Medley should have caught the mistake when he signed off on batches 433 and 434. (GC Exhs. 5B, 6A, 7A.) In addition, the credited testimony of Ross shows that Medley first told her that he did not check the ticket for batch 432, and subsequently told her that he could not check the ticket because it was printing out when he returned to check batches 433 and 434. Thus, the credible evidence viewed as a whole shows that based on the information available to the Respondent, it had a legitimate reason for disciplining Medley.

Even assuming for the sake of argument that the controller clock was off on April 6, and the ticket was not available when Medley first returned to check batches 433 and 434, there is no credible explanation for why Medley did not, or could not, check again for the printer ticket after he concluded checking batches 433 and 434. Nor is there a credible explanation for why he could not have waited for the ticket to print after signing off on batches 433 and 434. Rather, the evidence shows that waiting for the ticket to print would not have impeded production because batch 432 had to be mixed before batch 433 proceeded to the mixer. The failure to catch the mistake at that point resulted in the bad batch proceeding down the line through the production process resulting in the quarantine of all the batches.

The undisputed evidence shows that Medley had two recent prior disciplines for similar oversights and that the Respondent followed its progressive disciplinary policy. In this connection, there is no evidence that the Respondent proportions culpability in assessing discipline. Rather, it assesses the next disciplinary step, which in this case was discharge. For example, in December 2003, Medley, as second shift QCI, was given a written warning for failing to catch the wrong edge code which was the first step in the disciplinary process. However, Staples, the third shift QCI, received a one-day suspension for the same offense because he was at second step of the disciplinary process. (See R. Exhs. 6 and 9.) In this case, discharge was the next step of the disciplinary process for Medley.

Based on all the credible evidence viewed as a whole, I find that the Respondent would have discharged Medley even in the absence of his union activity. Accordingly, I shall recommend the dismissal of paragraph 10 of the complaint.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Local 2123, AFL-CIO (Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct:

(a) soliciting grievances from employees in one-to-one meetings in order to discourage their support for the Union;

(b) distributing a letter to all employees which threatened that their benefits would start over from scratch if they selected a Union as their collective-bargaining representative;

(c) distributing a letter to all employees which solicited grievances from them in order to discourage their support for the Union;

(d) promulgating an overly broad no-solicitation rule by telling Union advocate Steven Medley that he was not allowed to talk to other employees unless it was work related; and

(e) discouraging Union advocate Steven Medley from participating in union activities.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by subjecting Union advocate Steven Medley to closer supervision.

5. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[30]

ORDER

The Respondent, Motion Control Industries, Inc., Fredericksburg, Virginia, its officers, agents, and representatives, shall

[30] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) soliciting grievances from employees in one-to-one meetings in order to discourage their support for the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Local 2123, AFL-CIO (Union);

(b) distributing a letter to all employees which threatened that their benefits would start over from scratch if they selected a Union as their collective-bargaining representative;

(c) distributing a letter to all employees which solicited grievances from employees in order to discourage their support for the Union;

(d) promulgating an overly broad no-solicitation rule by telling Union advocate Steven Medley that he was not allowed to talk to other employees unless it is work related;

(e) discouraging Union advocate Steven Medley from participating in union activities;

(f) subjecting Union advocate Steven Medley to closer supervision;

(g) In any other manner interfering with restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

Within 14 days from the date of this Order, rescind its verbal no solicitation policy promulgated and implemented on or about March 15, 2004, restricting employees from talking to each other unless the discussion is work related.

Within 14 days after service by the Region, post at its facility in Fredericksburg, Virginia, copies of the attached notice marked "Appendix."[31] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 11, 2004.

Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

---

[31] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. January 6, 2006

C. Richard Miserendino
Deputy Chief
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT solicit grievances from employees in one-to-one meetings in order to discourage their support for the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Local 2123, AFL-CIO (Union).

WE WILL NOT distribute a letter to our employees which threatens that their benefits would start over from scratch if they select a Union as their collective-bargaining representative.

WE WILL NOT distribute a letter to all employees which solicit grievances from them in order to discourage their support for the Union.

WE WILL NOT promulgate an overly broad no-solicitation rule by telling Union advocate Steven Medley that he is not allowed to talk to other employees unless it is work related.

WE WILL NOT discourage Union advocate Steven Medley from participating in union activities.

WE WILL NOT subject Union advocate Steven Medley to closer supervision.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind our verbal no solicitation policy promulgated and implemented on or about March 15, 2004, restricting employees from talking to each other unless the discussion is work related.

MOTION CONTROL INDUSTRIES, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

103 South Gay Street, The Appraisers Store Building, 8th Floor

Baltimore, MD 21202-4061

Hours: 8:15 a.m. to 4:45 p.m.

410-962-2822.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 410-962-3113.